
EPASINGHE**Vs.****TILLEKERATNE**

COURT OF APPEAL
GOONERARTNE, J.
SAMAYAWARDHENA, J.
CA/RI/12/2016
DC PANADURA 3464/D
MAY 22, 2019

Decree of divorce—Fraud—Abuse of the process of court—Death of a party after the fraud—Restitutio in integrum—Nullity

The petitioner filed this application for restitutio in integrum seeking to set aside the ex parte decree of divorce obtained by her deceased husband on the basis that summons and decree nisi had never been served on her. The main contention of the respondent before the Court of Appeal was that the petitioner should get the ex parte decree vacated in the District Court before coming to the Court of Appeal.

Held:

1. The petitioner convincingly proved before the Court of Appeal that she was abroad during the time of the alleged service of summons and the decree nisi on her in Sri Lanka. No judgment can be allowed to stand if it has been obtained by fraud. The decree of divorce has been obtained fraudulently and therefore it is a nullity.
2. On the facts of this case, the application for restitutio in integrum filed by the petitioner in the Court of Appeal is correct.

Cases referred to:

1. Ittepana v. Hemawathie [1981] 1 Sri LR 476
2. Sitthi Maleeha v. Nihal Ignatius Perera [1994] 3 Sri LR 270
3. Joyce Perera v. Lal Perera [2002] 3 Sri LR 8
4. Leelawathie v. Jayaneris [2001] 2 Sri LR 231
5. Kusumawathie v. Wijesinghe [2001] 3 Sri LR 238
6. Paulis v. Joseph [2005] 3 Sri LR 162
7. Andradie v. Jayasekera Perera [1985] 2 Sri LR 204
8. Biso Manika v. Cyril De Alwis [1982] 1 Sri LR 368
9. Sebastian Fernando v. Katana Multi-Purpose Co-operative Society Ltd [1990] 1 Sri LR 342
10. Velun Singho v. Suppiah [2007] 1 Sri LR 370
11. Suppramaniam v. Erampakurukul (1922) 23 NLR 417 at 435
12. Maduluwawe Sobitha Thero v. Joslin [2005] 3 Sri LR 25 at 28
13. Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands (1974) 80 NLR 1
14. Lazarus Estates Ltd v. Bearely (1956) 1 All ER 341 at 345
15. Dember v. Abdul Hafeel (1947) 49 NLR 62 at 66

APPLICATION for restitutio in integrum from the Judgment of the District Court of Panadura.

Duleeka Imbuldeniya for the Petitioner.

Charith Galhena for the Respondent.

cur. adv. vult.

May 29, 2019

SAMAYAWARDHENA, J.

The petitioner filed this application for restitutio in integrum seeking to set aside the decree of divorce granted by the District Court of Panadura in Case No. 3464/D.

The divorce action had been filed by the deceased husband against the petitioner and the divorce had been obtained ex parte on the basis that summons was served on her. According to the journal entry No. 1 of the District Court case record, summons has been ordered to be issued on 05. 01. 2006 returnable on 16. 01. 2006. The same journal entry further reveals that the plaintiff has hurriedly filed the divorce action and obtained a short date for summons returnable stating that the petitioner has come

to Sri Lanka from abroad for a one-month holiday. According to journal entry No. 2 dated 16. 01. 2006, the summons has been served on the petitioner by personal service. Then according to the journal entry dated 08. 05. 2006, ex parte decree nisi has also been served on the petitioner by personal service on 26. 04. 2006.

The petitioner has convincingly proved before this Court by producing her two passports marked P8(c) and P8(d) that she was not in Sri Lanka at the time the summons and decree nisi were alleged to have been personally served on her by the Fiscal. That is the best evidence to prove the falsity of the Fiscal report.

After obtaining the divorce by fraud, the deceased husband had married the respondent to this application even before the decree nisi was made absolute.

It is significant to note that notwithstanding that the respondent has been represented by counsel before this Court, the respondent has not filed objections to this application controverting those facts. Hence those facts remain unchallenged.

Nonetheless, the learned counsel for the respondent has filed written submissions and participated at the argument. His submissions, in my view, are beside the point.

The sole matter to be decided is whether summons has been served on the defendant, i. e. the petitioner to this application, in the said Divorce Case?

Whether the petitioner was abroad with a valid visa or not, which was what the counsel for the respondent attempted to highlight during the course of the argument, is irrelevant.

As was held in the celebrated case of *ltepana v. Hemawathie:1*

Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or otherwise notified of the proceedings against him, the judgment entered against him in those circumstances is a nullity. The proceedings being void, the person affected by them can apply to have them set aside ex debito justitiae in the exercise of the inherent jurisdiction of the Court.

Vide also Sitthi Malecha v. Nihal Ignatius Perera, 2Joyce Perera v. Lal Perera, 3Leelawathie v. Jayaneris. 4

Once the petitioner has become aware of the divorce that was fraudulently obtained, she has filed a separate action in the same District Court to get the ex parte decree set aside. This action has been dismissed by the District Court stating that the petitioner shall, in view of *Kusumawathie v. Wijesinghe*,⁵ seek relief by way of an application for restitutio in integrum before this Court. The petitioner has filed a revision application and a final appeal against that dismissal in the High Court of Civil Appeal and later withdrawn the revision application.

The dismissal of that action by the District Judge is flawless. The petitioner cannot litigate in the District Court against a dead person. In such circumstances, only the Court of Appeal has the power under Article 138 to set aside the decree obtained fraudulently in an application for restitutio in integrum. *Vide Kusumawathie v. Wijesinghe (supra), Paulis v. Joseph. 6*

The cases cited by the learned counsel for the respondent, including *Andradie v. Jayasekera Perera*,⁷ to say that the petitioner shall first make the application in the District Court to have the ex parte decree vacated, are inapplicable and distinguishable, because in those cases, unlike in the instant case, the plaintiffs were alive when the defendants straightaway came before this Court to get the ex parte decrees vacated on fraud.

Going before different Courts and getting unfavourable orders and later withdrawing some of them etc., do not, as the counsel for the respondent submits, amount to waiver or renunciation of the petitioner's right to come before this Court by way of restitutio in integrum.

Counsel also submits that the petitioner is guilty of laches. Delay shall not be a ground for dismissal of an action when there is a manifest fraud, especially, abusing the process of the Court, proven before Court. (*Biso Manika v. Cyril De Alwis*,⁸*Sebastian Fernando v. Katana Multi-Purpose Co-operative Society Ltd*,⁹*Velun Singha v. Suppiah*¹⁰)

Chief Justice Bertram in *Suppramaniam v. Erampakurukal*¹¹ citing Black on Judgments, Vol 1, Section 292- 293, stated that "Fraud is not a thing that can stand even when robed in a judgment. *Vide also Madukuwawe Sobitha Thero v. Joslin.*¹²

In *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands*,¹³ Justice Vythialingam at page 66 and Justice Weeraratne at page 140 quoted with approval the following dicta of Lord Denning in *Lazarus Estates Ltd v. Bearely*:¹⁴

No Judgment of a Court or order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is specially pleaded and proved. But once it is proved it vitiates judgments, contracts, and all transactions whatsoever.

Regarding the ambit of an application for restitutio in integrum, the following observation of Canekeratne J. in *Dember v. Abdul Hafeel*¹⁵ is of particular importance:

The cases in which application for relief by way of restitution in respect of judgments of original courts have been made in Ceylon can, broadly speaking, be classed under two heads: (a) where a judgement has been obtained by fraud or where there has been a discovery of fresh evidence; (b) where a judgment has been entered of consent and there has been an absence of a real consent such as in cases of fraud, fear, excess of authority and mistake.

The decree of divorce in the instant case has been obtained by the deceased husband of the petitioner by fraud without summons being served on the petitioner. Hence the decree entered against her is a nullity.

The petitioner, as she has gone before various Courts making various applications, has, maybe due to overzealousness, sought various reliefs in this application. But granting relief as prayed for in paragraph (c) of the prayer to the petition, which is, quashing the entire proceedings in the Panadura District Court Case No. 3464/D from the date on which summons is alleged to have been served on the defendant including the ex parte Judgment, decree nisi and decree absolute entered, serves the purpose. Accordingly, the said relief is granted. No costs.

GOONERATNE, J. - *I agree.*

Application allowed.

Judgment by: Mahinda Samayawardhena, J.

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